

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SCOTT SANDARG

Plaintiff and Appellant,

v.

DENTAL BOARD OF CALIFORNIA

Defendant and Respondent.

B210072

(Los Angeles County
Super. Ct. No. BS112764)

APPEAL from a judgment of the Superior Court of Los Angeles County, James Chalfant, Judge. Affirmed.

Norman L. Schafler for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Alfredo Terrazas, Marc D. Greenbaum, Linda K. Schneider, and Shawn Paul Cook, Deputy Attorneys General for Defendant and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of sections 2, 3, 4, 5(a) of the Background portion and sections 2, 3, 4(b) and 5 of the Discussion portion.

INTRODUCTION

The Dental Board of California (board) revoked Scott Sandarg's dental license after adopting a decision by an administrative law judge. Sandarg filed a petition for a writ of mandate in the superior court seeking reinstatement of his license. The superior court denied Sandarg's petition. We affirm.

We publish a portion of this opinion in order to address an issue of first impression: What is the standard of proof for a petition to revoke a dental licensee's probation? We shall conclude that the standard of proof is preponderance of the evidence.

BACKGROUND

1. *The Initial Revocation of Sandarg's License and the Placement of Sandarg on Probation*

Sandarg obtained a license to practice dentistry in California in 1997. Shortly after obtaining his license, Sandarg commenced a course of conduct that led to disciplinary action.

In 1999, the board filed an accusation against Sandarg for self-furnishing of a controlled substance and alteration of patient charts.¹ In March 2000, the board and Sandarg entered into a stipulation in settlement of the accusation, which became effective as of April 17, 2000.

Under the stipulation Sandarg admitted that in violation of Business and Professions Code section 1680, subdivisions (m) and (s), he unlawfully used anabolic steroids in 1998 and 1999 to enhance his participation in martial arts. Sandarg further admitted that he falsely told board investigators that he used steroids to treat his patients and that he altered his patient records to support this false story.

¹ A hearing to determine whether a right, authority, license or privilege by a holder of a license to practice dentistry is initiated by the board filing an "accusation." (Gov. Code, § 11503; see also Bus. & Prof. Code, §§ 1670, 1601.1.)

The stipulation provided that Sandarg's license was revoked. However, the revocation order was stayed and Sandarg was placed on probation, subject to 15 terms and conditions, for a period of five years ending on April 17, 2005. (See Bus. & Prof. Code, § 1671.) There were five terms and conditions of probation that are relevant here: (1) condition No. 2 required Sandarg to participate in a diversion program if the program manager determined that his participation would be appropriate; (2) condition No. 3 required Sandarg to obey all federal, state and local laws and regulations governing the practice of dentistry, and to remain in full compliance with any court-ordered criminal probation, payments and other requirements; (3) condition No. 4 required Sandarg to submit quarterly declarations under penalty of perjury on the board's quarterly report compliance forms stating whether he complied with all the conditions of probation; (4) condition No. 7 required Sandarg to inform the board in writing within 15 days of any change of address of his practice or residence; and (5) condition No. 12 required Sandarg to abstain from all use and possession of controlled substances unless legally prescribed for medically or dentally diagnosed health reasons for a bona fide illness or medical/dental condition.

In addition, the stipulation provided that if Sandarg violated any terms of the probation, the board could set aside its stay order and revoke Sandarg's license. Further, the stipulation stated that if during the period of probation, an accusation or petition to revoke probation was filed against Sandarg's license or the Attorney General's office was requested to prepare an accusation or petition to revoke probation during that time, the probationary period would be automatically extended and would not expire until the accusation and/or petition to revoke probation was acted upon by the board.

2. *Sandarg's Violation of a Provision of the Harbors and Navigation Code*

On March 31, 2001, Sandarg received a citation for reckless operation of a vessel in violation of Harbors and Navigation Code section 655, subdivision (a). The San Bernardino district attorney later filed a criminal complaint against Sandarg charging Sandarg with reckless operation.

The criminal complaint was subsequently amended to dismiss the reckless operation charge and to add a charge of violation of Harbors and Navigation Code section 652, subdivision (c), which prohibits the use of a vessel which does not carry the equipment or meet the standards required by law. On November 5, 2001, Sandarg pleaded nolo contendere to violation of section 652(c), a misdemeanor, and the superior court found him guilty based on his plea.

3. *Sandarg's Positive Tests for Controlled Substances*

Between April 6, 2001 and October 13, 2005, Sandarg tested positive six times for controlled substances, including anabolic steroids. Sandarg claimed that he had prescriptions for these drugs.

4. *Sandarg is Convicted of Violating Drug Laws and for Illegally Dumping Waste Matters*

On February 20, 2004, Sandarg was arrested for unlawful possession of several controlled substances, including methamphetamine, hydrocodone, and Valium, and for depositing waste matter in violation of Penal Code section 374.3, subdivision (a). Based on the evidence gathered at the time of Sandarg's arrest, the Orange County District Attorney filed a felony complaint setting forth nine counts. Of relevance here, count 1 charged Sandarg with possession of a controlled substance (methamphetamine), a felony, in violation of Health and Safety Code section 11377, subdivision (a). Count 3 charged Sandarg with being under the influence of a controlled substance (methamphetamine), a misdemeanor, in violation of Health and Safety Code section 11550, subdivision (a). Count 4 charged Sandarg with dumping waste matter, a misdemeanor, in violation of Penal Code section 374.3(h)(1).

On September 7, 2004, Sandarg pleaded guilty to counts 1, 3 and 4, and the district attorney dismissed the remaining counts. As part of the plea agreement, Sandarg admitted the following: "On or about February 20, 2004 in Orange County, I willfully and unlawfully possessed a usable quantity of a controlled substance, to wit: methamphetamine, and was under the influence of the same. [¶] I also dumped waste matter in non-commercial quantities, unlawfully."

As to counts 1 and 3, the court deferred judgment pending Sandarg's completion of a drug treatment program pursuant to Penal Code section 1000. On June 14, 2006, the court held a hearing regarding counts 1 and 3. The court found that Sandarg's testimony was not credible and ordered Sandarg's drug treatment program pursuant to Penal Code section 1000 terminated. On October 10, 2006, the court imposed a suspended sentence of three years of formal probation, and ordered Sandarg to complete a drug treatment program.

On April 27, 2007, Sandarg filed a motion to declare his conviction of possession of a controlled substance a misdemeanor. On September 27, 2007, the motion was granted.

On July 11, 2007, Sandarg filed a petition to set aside plea and vacate judgment with respect to counts 1 and 3. On November 2, 2007, the petition was granted on the grounds that Sandarg had "successfully complete drug treatment and substantially complied with the conditions of probation."

5. *The 2006 Accusation and Petition to Revoke Probation*

In September 2006, the board filed an accusation and petition to revoke probation.

a. *The Accusation*

The accusation set forth 10 alleged causes for discipline. The first cause for discipline was conviction of crimes substantially related to the practice of dentistry. This cause was based on Sandarg's convictions of possessing a controlled substance, being under the influence of a controlled substance, dumping waste matter, and violating Harbors and Navigation Code section 652, subdivision (c). The second cause for discipline was for convictions of crimes involving controlled substances or dangerous drugs.

The third cause for discipline was for repeated acts of negligence and/or incompetence. This cause was based on the following allegations. From about 2002 through 2004, Sandarg "regularly wrote prescriptions to his patients for the benzodiazepine derivative, Diazepam (Valium), and had his staff fill the prescriptions at a local pharmacy, Savon, near his office." After giving the patients a few tablets of

Valium, Sandarg “would keep the remaining tablets in his office, ostensibly for future appointments.” Sandarg “combined the partially-filled Valium prescription bottles for various patients into a single container ostensibly for dispensing to patients by his staff and failed to follow procedures required by law.”

The fourth cause for discipline was for excessive prescribing. This cause was based on the same facts that supported the third cause for discipline.

The fifth cause for discipline was for possession of controlled substances or dangerous drugs. The board alleged that on February 20, 2004, the Huntington Beach police performed a search of Sandarg’s vehicle and found numerous controlled substances, including methamphetamine, diazepam and hydrocodone, as well as dangerous drugs, including amitriptyline and levothyroxine. The board further alleged that on or about March 1, 2005, agents of the Drug Enforcement Agency (DEA) performed a lawful search of Sandarg’s residential property and found numerous controlled substances and dangerous drugs, including anabolic steroids and hydrocodone.

The sixth cause for discipline was for obtaining controlled substances by fraud, deceit or misrepresentation. The board alleged that from 2002 to 2004, Sandarg obtained prescriptions for steroids from a Dr. Jim D’Amico, a licensed dentist in Florida. Dr. D’Amico, however, is not licensed to practice dentistry in California nor licensed in this state to prescribe controlled substances and/or dangerous drugs.

The board further alleged that on at least four occasions, Sandarg obtained hydrocodone and other drugs from a pharmacy ostensibly prescribed by Dr. Dinh. According to Dr. Dinh, however, Dr. Dinh did not authorize the prescriptions.

The board also alleged that Sandarg prescribed Valium and Xanax to certain patients but those patients did not recall receiving such medications. In addition, the board alleged that Sandarg received over 4000 tablets of controlled substances from Henry Schein, a national pharmaceutical distribution company, by fraud, deceit or misrepresentation.

The seventh cause for discipline was for administering controlled substances to oneself. This cause is based on Sandarg allegedly being under the influence of

methamphetamine and opiates on or about February 20 and 21, 2004. The board also alleged that Sandarg tested positive six times for controlled substances, including anabolic steroids, between April 2001 and October 2005.

The eighth cause for discipline was for use of controlled substances in a dangerous manner. The board alleged that Sandarg used diazepam, hydrocodone, flurazepam, anabolic steroids, man-made steroids, benzodiazepines, anti-estrogens, depressants, vasodilators, and muscle relaxant controlled substances and/or dangerous drugs in a manner dangerous or injurious to himself.

The ninth cause for discipline was for failure to follow prescription and dispensing procedures. This cause was based on the same allegations supporting the third cause of discipline.

Finally, the tenth cause for discipline was for aiding and abetting an unlicensed person to practice dentistry. This cause was based on Sandarg allegedly allowing one of his employees to perform coronal polishing.

b. *The Petition to Revoke Probation*

In the petition to revoke probation, the board alleged that Sandarg failed to comply with the conditions of his probation. Specifically, Sandarg allegedly failed to comply with condition No. 2 because he did not complete a diversion program; failed to comply with condition No. 3 in that he was convicted of various crimes and was in possession of controlled substances and dangerous drugs without a valid prescription; failed to comply with condition No. 4 because his quarterly reports did not disclose that he was arrested and misrepresented that he had abstained from the use of drugs; failed to comply with condition No. 7 because he did not advise the board of changes to his residential address; and failed to comply with condition No. 12 because he did not abstain from using and possessing controlled substances.

6. *The Administrative Law Judge's Proposed Decision*

In September and October 2007, Administrative Law Judge Timothy Thomas held a hearing on the board's accusation and petition to revoke probation. On November 8, 2007, Judge Thomas issued a 49-page proposed decision, which included detailed factual

findings and legal conclusions. The proposed decision stated that the standard of proof for the accusation was clear and convincing evidence, and that the standard of proof for a petition to revoke probation was the preponderance of the evidence.

With respect to the accusation, the proposed decision stated that the board proved by clear and convincing evidence that cause existed for all of the causes of discipline except for the fourth cause. As a remedy, the proposed decision ordered that Sandarg's license be revoked.

The proposed decision further stated that the board proved by a preponderance of the evidence that cause existed to grant the board's petition because Sandarg violated probation terms 3, 4, 7 and 12. As a remedy, the proposed decision ordered that Sandarg's probation be revoked and that the stay of the order dated April 17, 2000, revoking Sandarg's license be lifted. Finally, the proposed decision ordered Sandarg to pay \$41,894.70 for the reasonable costs of investigation and enforcement of the matter.

On December 19, 2007, the board adopted the proposed decision, effective January 21, 2008.

7. Proceedings in the Superior Court

On January 8, 2008, Sandarg filed a petition for a writ of administrative mandate. In his petition, Sandarg prayed for an order requiring the board to set aside Judge Thomas's proposed decision and an order reinstating Sandarg's dental license.

On June 25, 2008, the superior court issued an order denying the petition. The order adopted a 12-page detailed tentative ruling of the court setting forth the court's factual findings and legal conclusions. The court concluded with the following statement: "The evidence that supports discipline of Petitioner's License and revocation of his Probation is extensive. Sandarg's probation required that he obey all laws. He violated that condition when he was convicted for possession/use of methamphetamine in February, 2004. He violated condition four, that he file quarterly reports under oath, when he did not disclose his arrest for methamphetamine; did not disclose that he had been cited for unsafe operation of a water craft; and when he falsely claimed that he had abstained from the unauthorized use of drugs.

“Sandarg violated condition seven of his probation when he failed to notify the Board in writing of his address changes and that he was living at two different addresses.

“Condition twelve of probation required that Sandarg abstain from the ‘use and possession of controlled substances unless legally prescribed for medically or dentally diagnosed health reasons for a bona fide illness or medical/dental condition.’ He violated this condition: when he used and possessed methamphetamine on February 20, 2004; when he obtained Hydrocodone over the Internet without an exam, when he wrote prescriptions for Hydrocodone, Vicoprofen, Cyclobenzaprine, Robaxin, Vioxx and Methocarbamol to himself, when he used the possessed anabolic steroids without valid prescriptions, when he possessed two ‘manufacturer’s bottles’ of Alprazolam (Xanax) at his residence, and when he possessed prescriptions for Cyclobenzaprine and Alprazolam (Xanax) ostensibly prescribed by Dr. Dinh, who stated that he did not issue such prescriptions.

“Sandarg is an unapologetic and unreformed abuser of illegal and prescription drugs alike, with apparently no interest whatsoever in rehabilitation. The Board was justified in revoking his license, on a preponderance of the evidence as a probation violation and on clear and convincing evidence as an original revocation proceeding.”

Judgment was entered in favor of the board and against Sandarg on July 28, 2008. This appeal followed.

CONTENTIONS

Sandarg contends that the superior court should have granted his petition with respect to the board’s accusation on the grounds that he was not convicted of any crimes, there was no admissible evidence of his long term possession and abuse of controlled substances, there was insufficient evidence to support Judge Thomas’s findings, and the board intentionally withheld evidence from its own expert toxicologist, Fred Fung, M.D. With respect to revocation of his probation, Sandarg contends that the superior court should have granted his petition on the grounds that Judge Thomas applied the wrong standard of proof, that his probation period was not extended as the board contends and thus the period expired, and that Judge Thomas erroneously concluded that the terms of

Sandarg's probation were violated. Finally, Sandarg argues that the award of costs should be overturned because Judge Thomas erroneously refused to compel a deputy attorney general to testify regarding the matter and because there was insufficient evidence to support the amount of the costs awarded.

We shall address Sandarg's argument that Judge Thomas applied the wrong standard of proof in the published portion of the opinion. All other arguments are addressed in the unpublished portion of the opinion.

DISCUSSION

1. Standard of Review

“ “The right to practice one's profession is a fundamental vested right and if a person's license to practice that profession is revoked by an administrative agency, when a petition for a writ of mandate is brought for restoration of the license, the trial court must apply its independent judgment to its review of the facts underlying the administrative decision. [Citations.]” ’ ’ (Green v. Board of Dental Examiners (1996) 47 Cal.App.4th 786, 795 (Green).)

“ “Under the independent judgment rule, the trial court must weigh the evidence and make its own determination as to whether the administrative findings should be sustained. When an appeal is taken from the trial court's determination, it is given the same effect as any other judgment after trial rendered by the court: the only question is whether the *trial court's* (not the administrative agency's) findings are supported by substantial evidence. [Citation.] Conflicts in the evidence must be resolved in favor of the judgment and where two or more inferences can be reasonably drawn from the facts, the reviewing court must accept the inferences deduced by the trial court.” [Citation.] However, “ . . . the trial court's legal conclusions are open to our examination to determine if errors of law were committed.” [Citation.]

“ “Evidence is substantial if any reasonable trier of fact could have considered it reasonable, credible and of solid value.” [Citation.] Additionally, a reviewing court “may look to the findings in [the administrative agency's] decision for guidance in

determining whether the trial court’s judgment is supported by substantial evidence.” [Citation.]’ ” (*Green, supra*, 47 Cal.App.4th at p. 796.)

2. *Sandarg Forfeited the Claim of Error That There was Insufficient Evidence to Support the Trial Court’s Judgment*

We must presume that the record contains evidence to support every finding of fact of the trial court unless the appellant proves otherwise. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737 (*Schmidlin*).) “A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable.” (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218 (*Doe*).) Further, a party who challenges the sufficiency of the evidence must present the facts in a light most favorable to the prevailing party. (*Schmidlin*, at p. 737-738.)

The appellant must also provide a summary of the significant facts in the record and provide references to the record to support his or her claims regarding the evidence. (Cal. Rules of Court, rule 8.204(a)(1)(C) & (a)(2)(C).) It is not up to the court to search the record to determine whether the appellant’s assertions about the evidence are true. (*Schmidlin, supra*, 157 Cal.App.4th at p. 738.) When an appellant fails to fully analyze the evidence with specific citations to the record, or only presents facts and inferences favorable to his or her position, the contention that the findings are not supported by substantial evidence is deemed forfeited. (see *id.* at pp. 737-738; *Doe, supra*, 177 Cal.App.4th at p. 218.)

Here, Sandarg does not provide a coherent summary of the evidence and does not set forth, discuss and analyze most of the evidence relied upon by the board. Instead, Sandarg devotes most of his brief to evidence he claims is favorable to him and to rearguing hotly disputed factual issues. Sandarg also fails to provide record citations to support many of the purported facts he relies upon.²

² Additionally, Sandarg did not properly present the record to this court. California Rules of Court, rule 8.120(a)(2) provides: “If an appellant intends to raise any issue that requires consideration of the record of an administrative proceeding that was admitted in

Worse still, Sandarg repeatedly makes factual assertions that are demonstrably false. For example, Sandarg alleges that the board had “no evidence of drug abuse” by Sandarg. This is not true. The board had a mountain of evidence to support its allegation that Sandarg abused drugs, including but not limited to Sandarg’s confession under oath in his plea agreement that he used methamphetamine, and the testimony of two police officers the administrative law judge found to be “credible witnesses.”

Officer Boldt, for example, testified at the administrative hearing and stated in his police report that, at the time of his arrest, Sandarg displayed signs of being under the influence of methamphetamine—he was sweating profusely, had slurred speech, and had dilated pupils. Boldt further testified that in jail Sandarg admitted to Boldt that he had used methamphetamine. Sandarg ignores officer Boldt’s testimony and the other evidence of his abuse of drugs.

Because Sandarg has failed in his obligations concerning the discussion and analysis of the evidence relied upon by the superior court, we deem the claim of error that there was no substantial evidence to support the judgment forfeited. (*Doe, supra*, 177 Cal.App.4th at p. 218; *Schmidlin, supra*, 157 Cal.App.4th at p. 737.)

evidence, refused, or lodged in the superior court, the record on appeal must include that administrative record, transmitted under rule 8.123.” In turn, California Rules of Court, rule 8.123 requires the appellant to request the *superior court* to transmit the administrative record to the reviewing court. Sandarg did not comply with this rule. Instead, he lodged with this court two banker’s boxes containing documents which Sandarg contends was the administrative record lodged with and reviewed by the superior court. Furthermore, Sandarg failed to properly organize the exhibits purportedly admitted at the administrative hearing—the documents were held together by rubber bands and the pages were not sequentially numbered. We have overlooked these deficiencies and reviewed the record.

3. *Sandarg Failed to Show Any Errors in the Trial Court's Conclusion that the Board Was Justified in Revoking Sandarg's License Pursuant to the Accusation*

a. *The Alleged Violations of HIPAA*

Sandarg argues that the board obtained documents in violation of “HIPAA.”³ He contends that the board, without a subpoena, warrant or patient releases, obtained from pharmacies documents allegedly related to prescriptions written by Sandarg for his patients, prescriptions written by Sandarg's treating doctors for Sandarg, and purchases of medications made by Sandarg and his father.⁴

Sandarg, however, does not identify the provision of HIPAA that was allegedly violated, cite any statutory or case law authority to support his claim that HIPAA was violated or provide any analysis of an alleged HIPAA violation. Sandarg does not even describe precisely what he contends HIPAA prohibits. He has therefore forfeited any claim of error arising from an alleged HIPAA violation. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [“When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived”].)

³ Sandarg does not identify the name of the act other than its acronym, nor does he provide any statutory citations. Sandarg apparently contends that the board violated the Health Insurance Portability and Accountability Act of 1996 (Pub.L. No. 104-91 (Aug. 21, 1996), 110 Stat. 1936) (HIPAA). We will assume that is his contention.

⁴ The board contends that it obtained the documents in question through properly executed search warrants.

Even overlooking Sandarg's forfeiture, we reject the argument on the merits. The regulations enacted pursuant to HIPAA place restrictions on certain "covered entities" in their use and disclosure of confidential health care information. (45 C.F.R. § 164.500(a) (2009); see also 45 C.F.R. §§ 164.502-164.514 (2009).) In this case, the pharmacies, as health care providers, are covered entities; the board and its investigators are not. (45 C.F.R. § 164.104 (2009); see also 42 U.S.C. § 1320d-1.) The board therefore is not bound by HIPAA.

Moreover, as the superior court recognized, the pharmacies are expressly authorized to disclose protected information to a health oversight agency for oversight activities authorized by law, including licensure or disciplinary administrative proceedings. (45 C.F.R. § 164.512(d)(1) (2009).)⁵ Contrary to Sandarg's contention, the board is a "health oversight agency." For purposes of HIPAA, a health oversight agency is "an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, *that is authorized by law to oversee the health care system* (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant." (45 C.F.R. § 164.501(b)(v) (2009), emphasis added.) The board fits within that definition, as it is charged with protecting the public by exercising its licensing, regulatory, and disciplinary functions over dentists in this state. (Bus. & Prof. Code, § 1601.2.)

Additionally, the remedy for the pharmacies' alleged violation of HIPAA is civil and criminal sanctions *against the pharmacies*. (See 42 U.S.C. §§ 1320d-5, 1320d-6; *Acara v. Banks* (5th Cir. 2006) 470 F.3d 569, 571 [the remedy is civil and criminal

⁵ To the extent Sandarg's arguments are based on alleged violations of his *patients'* rights under HIPAA, Sandarg lacks standing to raise the issue in this appeal.

penalties; there is no private cause of action]; *Doe v. Board of Trustees of University of Illinois* (N.D.Ill. 2006) 429 F.Supp.2d 930, 944 [same]; *Runkle v. Gonzales* (D.D.C. 2005) 391 F.Supp.2d 210, 237 [same].) As the superior court noted, “[t]here is no remedy against [the board’s agent] Nicas and the DEA, the investigators who obtained the health information, for they had no duty of confidentiality under HIPAA.”

Sandarg contends that the administrative law judge should have excluded evidence allegedly gathered in violation of HIPAA. The board argues that the exclusionary rule does not apply to administrative proceedings relating to the revocation of a license to practice dentistry.⁶ Even assuming there was a HIPAA violation, we do not reach the issue of whether the exclusionary rule applies because Sandarg failed to show that a miscarriage of justice occurred as a result of the admission of evidence that allegedly was collected in violation of HIPAA.

A judgment cannot be reversed based on the erroneous admission of evidence unless the appellant shows that there was a miscarriage of justice. (Evid. Code, § 353, subd. (b); Cal. Const., art. VI, § 13.) “In civil cases, a miscarriage of justice should be declared only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 692.)

Here, the evidence Sandarg sought to exclude related to his illegal use of controlled substances. The admission of this evidence, even if erroneous, was not prejudicial because there was an abundance of evidence apart from documents allegedly obtained in violation of HIPAA that proved Sandarg’s illegal use of controlled

⁶ See *Park v. Valverde* (2007) 152 Cal.App.4th 877, 883 [the exclusionary rule “ ‘is rarely applied in civil actions in the absence of statutory authorization, although government agencies may be involved, and even though the government itself has unlawfully seized the evidence’ ”]; *Emslie v. State Bar* (1974) 11 Cal.3d 210 [exclusionary rule did not apply in State Bar disciplinary proceedings]; *Elder v. Bd. of Medical Examiners* (1966) 241 Cal.App.2d 246 [exclusionary rule applied in administrative proceeding relating to medical license].)

substances. As stated, two police officers testified regarding Sandarg's use of methamphetamine, and Sandarg confessed under oath that he did so. Accordingly, the admission of evidence allegedly obtained in violation of HIPAA is not a ground to reverse the judgment.

b. *The Board Could Revoke Sandarg's License Based on His Convictions of Crimes Even if Sandarg's Convictions Were Subsequently Set Aside*

Sandarg argues that there was no evidence to support the board's first and second causes for discipline, which were based on his conviction of using and possessing controlled substances. He contends that because the convictions were set aside in light of his successful completion of a drug treatment program, there was no cause for discipline. We disagree.

Former Business and Professions Code section 1670.1⁷ provided: "Any licentiate under this chapter may have his or her license revoked or suspended or be reprimanded or be placed on probation by the board for conviction of a crime substantially related to the qualifications, functions, or duties of a dentist or dental auxiliary, in which case the record of conviction or a certified copy thereof, certified by the clerk of the court or by the judge in whose court the conviction is had, shall be conclusive evidence.

"The board shall undertake proceedings under this section upon the receipt of a certified copy of the record of conviction. *A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any misdemeanor substantially related to the qualifications, functions, or duties of a dentist or dental auxiliary is deemed to be a conviction within the meaning of this section.* The board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, *irrespective of a subsequent order under any provision of the Penal Code, including, but*

⁷ This statute was amended effective July 1, 2009. (Sen. Bill No. 853 (2007-2008 Reg. Sess.) § 8.)

not limited to, Section 1203.4 of the Penal Code, allowing such person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information or indictment.” (Italics added.)

Accordingly, for purposes of disciplinary proceedings against Sandarg, his convictions of using and possessing controlled substances—crimes substantially related to his qualifications, functions or duties as a dentist—can serve as grounds to revoke his license, irrespective of the subsequent order by the criminal trial court vacating the judgment that he was guilty of those crimes.

c. *The Board’s Alleged Withholding of Evidence*

Sandarg alleges that the board “withheld” evidence from its own expert, Fred Fung, M.D.⁸ He claims that Dr. Fung was “completely discredited” in light of his failure to review critical evidence. This allegation, even if true, is not a basis to reverse the judgment. At most, Sandarg has presented an argument that undermines Dr. Fung’s credibility as a witness, an issue for the trier of fact. An appellate court, however, “has no power to reweigh the evidence, or to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn from the evidence.” (*Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624, 643 (*Williams*).)

⁸ Dr. Fung opined that (1) the use of anabolic steroids may lead to many serious side-effects, including organ failure, immune dysfunction, cancer, stroke, thrombosis, heart attack and decreased tendon strength; (2) if Sandarg were required to take steroids and other drugs allegedly prescribed for “early andropause, pituitary and testicular insufficiency,” then Sandarg would be “a very sick man”; and (3) the ingestion of steroids and other controlled substances is *prima facie* evidence of drug abuse.

4. *Sandarg Failed to Show Any Errors in the Trial Court's Conclusion that the Board Was Justified In Revoking Sandarg's Probation*
 - a. *The Administrative Law Judge and Trial Court Used the Correct Standard of Proof*

Sandarg argues that the administrative law judge and the trial court erroneously used the preponderance of evidence standard of proof in adjudicating the board's petition to revoke Sandarg's probation. He contends that the correct standard of proof was clear and convincing evidence. Sandarg is wrong.

"Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115.) Sandarg does not cite, and we are not aware of, any specific law regarding the standard of proof for a petition to revoke a dental licensee's probation. Accordingly, the board was required to prove its allegations by a preponderance of evidence.

Sandarg correctly points out that the standard of proof to revoke a professional license is clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The administrative law judge and the trial court applied that standard with respect to the board's accusation. But that same standard did not apply to the board's petition to revoke Sandarg's probation.

The courts have addressed a similar issue in criminal cases. The standard of proof in a criminal case is, of course, beyond a reasonable doubt. (Pen. Code, § 1096.) However, once a convicted criminal is placed on probation, the government is not required to prove beyond a reasonable doubt that he or she violated the terms of probation in order to revoke probation. Rather, the "standard of proof required for revocation of probation is a preponderance of evidence to support the violation." (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965.)

The same analysis applies here. While the board is required to prove the allegations in an accusation by clear and convincing evidence, it is only required to prove the allegations in a petition to revoke probation by a preponderance of the evidence.

b. *There Was Substantial Evidence to Support a Finding that the Probation Period Was Extended*

As stated, Sandarg's probation period expired on April 17, 2005. Under the terms of his probation, this period could be extended if, during the period of probation, the Attorney General's office was requested to prepare an accusation or petition to revoke probation.

There was substantial evidence that the probation period was extended beyond April 17, 2005. The board's investigator, Stephen T. Nicas, testified that on March 28, 2005, he personally delivered to the Office of Attorney General a memorandum dated March 25, 2005, requesting the Attorney General to file a petition to revoke probation. That memorandum was admitted into evidence. Consequently, under the terms of probation, Sandarg's probation period was extended until the petition to revoke probation was adjudicated.

Sandarg argues that his probation period was not extended and thus expired on its own terms because (1) the March 25, 2005, memorandum was fabricated and (2) Mr. Nicas's testimony at the administrative proceeding regarding his delivery of the memorandum was false. We reject this argument.

The superior court correctly recognized that Sandarg's argument "really is that Nicas and the [Attorney General's] record are not credible because there is no record of service of the probation extension on him." However, as we previously stated, we do not have the power to consider the credibility of witnesses or to reweigh the evidence. (*Williams, supra*, 177 Cal.App.4th at p. 643.) We therefore cannot reverse the judgment on the ground that Sandarg's probation period expired on its own terms.

5. *Sandarg Failed to Show Any Errors in the Trial Court's Judgment Affirming the Costs Awarded by the Board*

The administrative law judge may make a proposed finding directing a licentiate found to have committed violations of the Dental Practice Act (Business and Professions Code section 1600 et seq.), to pay the sum of reasonable costs of investigation and enforcement of the case, including but not limited to, charges imposed by the Attorney

General. (Bus. & Prof. Code, § 125.3, subd. (a).) The board may adopt such a finding. (Bus. & Prof. Code, § 125.3, subd. (d).)

In the present matter, the board presented to the administrative law judge a declaration by its executive officer, Richard L. Wallinder, Jr., an investigation activity report completed by Mr. Nicas, statements of services of expert dental consultants, and a declaration by Deputy Attorney General Shawn P. Cook regarding the costs incurred to investigate and enforce the case. These documents stated that the investigative costs were \$31,546.20, the costs of dental expert services were \$4,025, and the costs of the Attorney General's services were either \$30,237 or \$36,557.⁹ The administrative law judge's proposed finding was to award a total of \$41,894.70 in costs, which the board adopted and the trial court affirmed.

Sandarg argues that the cost award must be reversed because Deputy Attorney General Shawn P. Cook refused to testify at the administrative proceedings. Mr. Cook, however, was not required to do so. The administrative law judge and the superior court may adjudicate a request for costs based on declarations without requiring testimony at a hearing. (See Bus. & Prof. Code, § 125.3, subd. (c).)¹⁰

⁹ Mr. Wallinder's declaration states that the attorney general's costs were \$30,237, while Mr. Cook's declaration states that those costs were \$36,557.

¹⁰ Business and Professions Code section 125.3, subdivision (c) provides: "A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General."

Sandarg argues the board was not entitled to recover \$31,546.20 for Mr. Nicas's investigative services. The board sought to recover 355.25 hours at \$88.80 per hour. Sandarg contends that Nicas only spent 182.5 hours on the matter, and his wages were approximately \$30-35 per hour. Assuming without deciding that Sandarg is correct, then the reasonable value of Nicas's services was at a minimum \$5,475. If that amount is added to \$4,025 in dental expert costs, and \$36,557 in attorney general fees, there was at a minimum substantial evidence to support costs in the amount of \$46,057—well above the \$41,894.70 in costs actually awarded. We therefore find no error in the superior court's judgment affirming the board's cost award.

DISPOSITION

The judgment is affirmed. The board is awarded costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.